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No. 07-975

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Supreme Court of the United States

RONALD VOSE,

Petitioner,

v.

DONALD KLIMENT, Chief of Police of the City of Springfield, in his individual capacity and WILLIAM ROUSE, Deputy Chief of Police of the City of Springfield, in his individual capacity,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES ii

I. The Question Presented Is Squarely Raised By The Decision Below 1

II. Vose's Petition Clearly Identifies An Important and Unresolved Issue of Federal Law That Needs To Be Determined 3

III. Like the Seventh Circuit's Opinion, Respondents' Opposition Ignores the Dictates of *Garcetti* 5

IV Respondents' Opposition Misreads Vose's Contention About The Decisions of The Various Lower Federal Courts And Neither Cites To Nor Explains How Vose Misreads This Court's Precedent. 7

CONCLUSION 10

TABLE OF CITED AUTHORITIES

Page

Cases:

Brady v. Maryland,
373 U.S. 83 (1963) 10

Garcetti v. Ceballos,
547 U.S. 410, 126 S. Ct. 1951 (2006) ..... *passim*

Kyles v. Whitley,
514 U.S. 419 (1995) 10

United States Constitution:

First Amendment ..... *passim*

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents' Brief In Opposition to Petitioner Ronald Vose's Petition for Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on October 26, 2007, fails to address the substance of Vose's Petition and does not negate the merits of Vose's Petition.

I. The Question Presented Is Squarely Raised By The Decision Below.

Contrary to Respondents' first contention [Brief in Opposition, pp. 6-7], the Seventh Circuit did decide the question to which Vose's Petition for Writ of Certiorari is directed. This case came before the Seventh Circuit on review of the District Court's denial of Respondents' Rule 12(b)(6) Motion to Dismiss which, among other arguments, asserted a qualified immunity defense. [Petition at pp. 8-9; App., 1a-2a, 6a-7a][1]. As such, the Seventh Circuit's review was *de novo,* but with the Seventh Circuit having to accept all well-pled factual allegations in Vose's complaint as true, and making all permissible inferences in the Vose's favor. [App., 8a]. A reading of the Seventh Circuit's opinion clearly

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[1] References in this Reply to the Appendices set out in Vose's Petition for Writ of Certiorari are referenced herein as "(App., ___)". References in this Reply to the Appendices set out in Respondents' Brief in Opposition are referenced herein as "(Opposition App., ___)".

evidences that the Seventh Circuit dealt with the very facts, derived from Vose's complaint, as set out in the question Vose has put to this Court. As recited in the Seventh Circuit's opinion, Vose's complaint alleged that he was a City of Springfield police officer who advised his superiors and the Mayor of the City of Springfield, Illinois about misconduct and corruption in a unit for which he did not have responsibility or authority, which he investigated on his own initiative. (App., 2a-3a, 5a, 29a, 31a).

Respondents also argue that Vose's Question Presented "does not state that the Employee Sergeant was ordered by his superior to investigate and document the allegations", thus implying that the decision below was materially different than the Question Presented by Vose's Petition. [Brief in Opposition, p. 7] Respondents are incorrect. First, as indicated by both the Seventh Circuit's opinion [App.,1a-16a] and Vose's complaint [Opposition App., 1a-19a], Vose never pled in this complaint and the Seventh Circuit made no reading of Vose's complaint that Vose was ordered by his superior to investigate the wrongdoing and corruption that Vose disclosed to his superiors and to the City's Mayor. Second, as indicated by both the Seventh Circuit's opinion [App., p. 4a, 9a] and Vose's complaint [Opposition App., 9a at ¶37], Vose was ordered to document his allegations, however the Seventh Circuit stated that the focus of its opinion was on the oral statements made by Vose to his superiors of the wrongdoing Vose uncovered on his own initiative. [App., 9a].

The question presented by Vose's Petition, thus goes directly to the scope and application of this Court's

decision in *Garcetti v. Ceballo*, 547 U.S. 410, 126 S. Ct. 1951 (2006), to the facts and context of this case at bar: whether a public employee who supervises a work unit, (a) who learns of wrongdoing by employees in a separate work unit over which he has no authority and responsibility, and (b) who, prompted by a concern that this wrongdoing may impact his unit's work, conducts his own investigation that discloses wrongdoing and corruption, is entitled to the protection of the First Amendment under *Garcetti* against retaliation when the employee discloses that wrongdoing and corruption to his superiors and to the City's Mayor.

II. Vose's Petition Clearly Identifies An Important and Unresolved Issue of Federal Law That Needs To Be Determined.

Respondents' Opposition does not take issue with the fact that this case arises in the context of a significant and fundamental matter of First Amendment law and public concern, being whistleblowing on police wrongdoing and corruption. Nor does Respondents' Opposition take issue with Vose's argument that this Court's 5-4 decision in *Garcetti* has had very serious adverse consequences, namely that *Garcetti* is being read as a signal to public employees to not report governmental misconduct. Respondents' nevertheless argue that Vose's Petition "fails to identify an important and unresolved question of federal law that needs to be determined by this Court". [Opposition, p. 13]. This argument is clearly without merit.

As argued by Vose's Petition, *Garcetti* did not decide the question presented; the question is one for which there is serious room for debate; and the question is one of significant public concern, namely police corruption. Moreover, resolution of the question is imperative and will have far-reaching effects. For if police wrongdoing and corruption cannot be exposed without fear of retaliation, particularly by those employees most likely to learn of this wrongdoing and corruption–other police officers, then the risk of tainted arrests, trials, convictions and incarcerations is likely to continue unabated. [Petition, 10-15]. The impact of the existence of First Amendment protection for police officers who break the code of silence and blow the whistle on police wrongdoing and corruption, particularly where it is known to or tolerated by the very superior officers in the chain of command that the fellow police officer would have to make the disclosures, clearly is an important and unresolved issue of federal law that, in view of *Garcetti*, needs to be resolved by this Court.

This case comes before this Court at the pleading stage on a Rule 12(b)(6) motion to dismiss and therefore presents a clear question of law. It is an appropriate case for this Court to clarify how this Court's decision in *Garcetti*, and its standards of "official duties" and "practical inquiry" are intended to be applied in this very important and fundamental context of police misconduct and wrongdoing.

III. Like the Seventh Circuit's Opinion, Respondents' Opposition Ignores the Dictates of *Garcetti*

Respondents' Opposition basically stresses a single argument: Vose learned about the wrongdoing as a result of his job as the sergeant supervising the narcotics unit and acted out of concern that this wrongdoing may affect his unit's work. [Opposition, 10]. Respondents point out that the Seventh Circuit noted that Vose failed to consider that the alleged misconduct could directly affect Vose's narcotics unit. [Opposition, p. 11]. Respondents argue that Vose's Question Presented omits the fact that Vose "was investigating the misconduct because of his responsibility and authority over the narcotics unit and his concern that the misconduct would affect his unit's operation." [Opposition, p. 7.] Respondents also argue that the Seventh Circuit's opinion is consistent with *Garcetti* when it concludes that a public employee's more general responsibilities, in this case to make sure that the work of the public employee's unit is not compromised by some outside influence and coordinated with related units, "are not beyond the scope of official duties for First Amendment purposes." [Opposition, p. 10- 11; App. 14a-15a].

Like the Seventh Circuit, Respondents ignore the fact that this Court clearly stated in *Garcetti* that (a) "[t]he First Amendment protects some expressions related to the speaker's job" [126 S.Ct. at 1959]; (b) that "public employees do not surrender all of their First Amendment rights by reason of their employment" [126 S.Ct. at 1257]; (c) that whether the subject matter

of the speech involves the speaker's employment is "nondispositive" [126 S.Ct. at 1959]; and (d) the fact that a public employee expresses his or views inside the office is not dispositive [*Id.*].

As Vose's Petition argues, this Court's decision in *Garcetti* was not intended and should not be allowed to be applied by the lower courts to simply sweep all speech under the rubric of "official duties" simply because the employee's duties or concerns about the employee's work motivated the speech. Respondents' opposition ignores these principles and ignores *Garcetti* admonishment that employers are not permitted to "restrict employees' rights by creating excessively broad job descriptions." [126 S.Ct. at 1961.] As argued by Vose's Petition, the Seventh Circuit's opinion in the case at bar erodes and misapplies these principles and has improperly grafted on to the "official duties" test a focus on what has motivated the public employee to speak, and in doing so improperly made as dispositive the fact that Vose's speech related to his job, thereby in effect wrongfully writing a general reporting requirement into Vose's job description, and hence into all public employees job descriptions. [Petition, pp. 18-19]. Such a result is an unwarranted extension of, if not in direct contravention of *Garcetti*.

As part of their argument that the speech at issue was "on the job speech pursuant to [Vose's] official duties and job responsibilities", Respondents contend that Vose "does not allege a single instance when his criticism of the Detectives was made in his capacity as a private citizen." [Opposition, p. 10] This argument begs the question. For if Vose was not speaking pursuant to

his "official duties", he would be speaking as a citizen. Further, as Vose's Petition argues, Vose's speech about police wrongdoing and corruption is a relevant analogue to speech by citizens who are not public employees; that *Garcetti* did not hold that a public employee cannot speak as a citizen simply because the speech was made inside the office or motivated by the public employee's work; and that prior decisions of this Court make clear that a public employee can speak as a concerned citizen and public employee at the same time. [Petition, pp. 27-28]. Respondents' Opposition does not take issue with these contentions. Nor does Respondents' Opposition contest Vose's contention that whistle blowing on police wrongdoing and corruption is the very kind of activity engaged in by citizens who do not work for the government. [Petition, p. 17].

IV. Respondents' Opposition Misreads Vose's Contention About The Decisions of The Various Lower Federal Courts And Neither Cites To Nor Explains How Vose Misreads This Court's Precedent.

Respondents' Opposition states that Vose's Petition "is based upon a misreading of this Court's precedent". [Opposition, p. 13]. Yet Respondents fail to cite to a single precedent of this Court, other than *Garcetti*, and Respondents' Opposition nowhere states how it is that Vose's Petition misreads *Garcetti*.

Respondents also argue that Vose's Petition "has exaggerated the existence of conflicting decisions" and contend that the Seventh Circuit opinion in the case at bar is in harmony with decisions of the other circuit

courts with respect to the "official duties" test. [Opposition, pp. 11-12]. The lower federal court decisions cited by Vose in his Petition, do not demonstrate harmony, as Respondents contend, except in their outcomes of denying First Amendment protection to public employees. Rather, what these decisions do demonstrate, as Vose argues, is that the lower federal courts, including the Seventh Circuit, are coming up with their own diverse interpretations of the "pursuant to official duties" standard enunciated in *Garcetti* and that they are radically and unjustifiably expanding this Court's ambiguous standard of "pursuant to official duties." [Petition, pp. 20-21; Opposition, pp. 11-12].

The key issue, as Vose contends in his Petition, is whether the lower federal court decisions are properly applying this Court's intent in *Garcetti* or whether the lower federal courts are creating their own interpretations of the *Garcetti* "official duties" test so as to result in a very inconsistent patchwork of standards that requires further guidance from this Court, particularly in the context of whistleblowing that brings to light police wrongdoing and corruption. This Court's decision in *Garcetti* never stated or hinted that an employee's "official duties" always encompass a general responsibility to report to superiors any misconduct occurring by other public employees for whom the reporting employee has no responsibility. This Court's decision in *Garcetti* never used or hinted that the "pursuant to official duties" standard means that the speech is to be judged by the role the speaker occupied; or whether the speech is within the employee's portfolio; or whether the speech contributes or facilitates the employee's performance of his official

duties; or because the speech is consistent with the employee's general duties; or because the employee was merely doing what was expected of the employee. As cited in Vose's Petition [Petition, pp. 20-21], these are the standards being used by the lower federal courts. The consequence of these standards is to push the "pursuant to official duties" standard so far outwards that no speech a public employee could make that blows the whistle on wrongdoing and corruption of fellow employees would ever warrant First Amendment protection. This is not what *Garcetti* says and should not be what *Garcetti* intended.

Interestingly, Respondents Opposition does not take issue with Vose's contention that this Court's *Garcetti* decision did not provide any meaningful guidance about the "official duties" standard the decision enunciated. [Petition, p. 16]. It is this very lack of guidance that has now resulted in this patchwork of lower federal court decisions that have applied *Garcetti*'s "pursuant to official duties" standard in a manner that could not have been intended by this Court, particularly in the context of the case at bar. It is this very lack of guidance that has now resulted in the Seventh Circuit creating in the case at bar its own test for judging whether a public employee's speech is to receive the protection of the First Amendment.

It should also be noted that Respondents' Opposition does not contest Vose's contention that the Seventh Circuit failed to make a practical inquiry into all of the facts and circumstances surrounding the speech at issue and the employment relationship of Vose

to the Springfield Police Department, in derogation of this Court's admonishment in *Garcetti* that such a practical inquiry is required. 126 S.Ct. at 1961-62. Respondents' Opposition also does not take issue with Vose's contentions that (a) there was nothing in the record before the Seventh Circuit as to what were his job duties or whether he had any job responsibility to ferret out wrongdoing by other employees he didn't supervise and to report that wrongdoing; and (b) that the Seventh Circuit crossed the line into impermissible fact-finding. [Petition, pp. 25-26].

CONCLUSION

The factual context of this case—disclosure of police wrongdoing and corruption and the knowledge and tolerance of superior officers of that wrongdoing and corruption—regrettably far too often repeats itself. As Vose's Petition argues, the consequences of allowing *Garcetti* to be read as reinforcing the code of silence can only discourage police officers from acting responsibly and can only promote the wrongdoing and corruption. [Petition, pp. 11-12]. The consequence of reinforcing the code of silence in turn erodes the very principle that this Court has recognized as the foundation of this country's criminal justice system, namely the truth seeking function of the process. *See e.g. Kyles v. Whitley*, 514 U.S. 419, 439-40 (1995) (goal of criminal proceeding is justice); *Brady v. Maryland*, 373 U.S. 83, 88 (1963) (society wins only when criminal trials are fair). Police candor is imperative to that truth seeking function. Police wrongdoing and corruption undermines the criminal justice system. First Amendment protection for public employees who speak

out on police corruption is essential to preserving the truth seeking function of the system, for without such protection, it clearly will be more difficult to overcome the code of silence in law enforcement agencies. It is therefore imperative that this Court give clear guidance on this important issue.

For the reasons stated by Petitioner Ronald Vose in his Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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